Seen v 84 Lumber Co.
2019 NY Slip Op 33371(U)
November 12, 2019
Supreme Court, New York County
Docket Number: 190225/18
Judge: Manuel J. Mendez

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

SINAR SEEN, Individually and as Administrator of the Estate of MUNIR SEEN, Deceased,

Plaintiff

Against-

84 LUMBER COMPANY, et al.,

Defendant.

INDEX NO. 190225 /18

MOTION DATE 11-06-2019

MOTION SEQ. 006

MOTION CAL. NO

The following papers, numbered 1 to 5 were read on this motion by defendant IPA SYSTEMS, INC., for an order compelling WEYERHAUESER COMPANY to comply with IPA SYSTEMS, INC.'s Notice of Deposition dated July 31, 2019 and produce its Corporate Representative for deposition.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2,
Answering Affidavits — Exhibits	3-4
Replying Affidavits	5

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is ordered that this motion by IPA SYSTEMS, INC., (hereinafter "IPA") for an order compelling WEYERHAEUSER COMPANY (hereinafter "WEYERHAEUSER") to comply with IPA's Notice of Deposition dated July 31, and August 19, 2019 that seeks to depose a Corporate Representative from WEYERHAEUSER to obtain case specific discovery from it that would allow IPA to offer evidence in support of apportionment of fault against this party, and compelling WEYERHAEUSER to produce its Corporate Representative is denied.

Plaintiffs bring this action to recover against the defendants for personal injuries sustained from exposure to asbestos from the defendants' products. On February 22, 2019 IPA, in compliance with the CMO and NYCAL procedural rules in place for the taking of the deposition of a corporate representative of a co-defendant, requested from the Special Master permission to depose then co-defendant Weyerhaeuser's corporate representative. Weyerhaeuser opposed the request. The parties made multiple submissions to the Special Master providing their arguments of the need for, and opposition to, the deposition (See Exhibits A,B,D,E,F,J and K). The Special Master did not immediately rule on the request.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

On June 12, 2019 Weyerhaeuser notified IPA and the Special Master, via e-mail, that it had settled with plaintiff and was no longer a defendant in the case. It also requested that IPA withdraw its request for a deposition of its corporate representative (see Exhibit H). IPA's counsel responded on the same day that until Weyerhaeuser had a signed stipulation of discontinuance, they would be considered to still be a party in the case, and that they would not withdraw their request to the Special Master for a deposition of Weyerhaeuser's corporate representative (see Exhibit I). By e-mail dated June 21, 2019 Weyerhaeuser notified the Special Master that it objected to IPA's request for permission to conduct discovery deposition of a settled party (see Exhibit L). On July 25, 2019 Weyerhaeuser obtained a signed stipulation of discontinuance, filed it with the court and notified IPA and the Special Master that it was no longer a defendant in the case (see Exhibit M). On July 31, 2019 the Special Master granted IPA's request to take the deposition of a co-defendant's representative (see Exhibit L). On July 31, 2019 IPA served Weyerhaeuser with a written notice to take the deposition of its corporate representative (see Exhibit N). By letter dated August 8, 2019 Weyerhaeuser's counsel reminded IPA's counsel that Weyerhaeuser settled this matter, that as a settled defendant it is no longer a party in this case and that for this reason he cannot accept [IPA's] notice of deposition on behalf of Weyerhaeuser (see Exhibit O). IPA sent Weyerhaeuser a second notice of deposition on August 19, 2019 requesting that it produce a witness on September 18, 2019 (see Exhibit A). Weyerhaeuser provided a similar response on August 30, 2019 as its response of August 8, 2019 (see Exhibit B).

IPA now moves to compel Weyerhaeuser to comply with its notices of deposition and to produce a witness. It argues that this matter has been ruled on by the Special Master and that the court should deny and/or nullify Weyerhaeuser's stipulation of discontinuance based on inequity, injustice, and prejudice. Weyerhaeuser opposes the motion and argues that as a settled party it is no longer a "co-defendant" in this case, and not required to produce a witness for deposition solely based on a Notice of deposition. Furthermore, settlements of cases are greatly favored, and stipulations ordinarily enforced by the courts.

Defendant IPA alleges that it needs to obtain case specific discovery from Weyerhaeuser, in the nature of an examination before trial, to obtain evidence that would assist it in meeting its burden of proving the co-defendant's share of fault (see CPLR Article 16). It alleges that it has been placed in a very difficult position by the Case Management Order (CMO) and rulings from judges of the court relying on CPLR § 3117(a)'s strictures on the use of depositions at trial. The CMO at Section XI-E states:

> "The parties shall make every effort to use depositions, as well as other discovery, obtained from defendants in other cases as if taken in NYCAL. No other depositions shall be taken of defendants except upon stipulation of the parties or application to the Special Master. Such application shall specify the areas sought to be covered by an additional deposition and demonstrate that the proposed lines of questioning will not be repetitive or cover ground already adequately addressed in prior depositions of the defendant in question."

Defendant IPA further argues that in following the court's procedure it has been placed in an untenable position because Weyerhaeuser settled its case with plaintiff while they awaited a decision from the Special Master, and that without this case specific discovery, in the nature of depositions of Weyerhaeuser's corporate representative, it will be prejudiced and prevented from proving and obtaining apportionment of fault against Weyerhaeuser at trial.

On November 7, 2018 this court decided a motion by defendant JCI to take the deposition of co-defendants in the John DeRozieres v. ABB, Inc., etal (index 190350/17) case. In that decision this court stated it would allow the taking of depositions of co-defendants, to offer evidence in support of apportionment at trial, limited to: (1) The products they manufactured or sold, (2) the asbestos content of the products, (3) whether or not warnings were placed on the products during the relevant period and, if so, the wording, and (4) the trade associations they were a member of, and their activities with those associations. Furthermore, the court allowed this deposition if done in a way that does not further delay plaintiffs' ability to bring their case to trial, after the party requesting the deposition obtains permission from the Special Master during the discovery phase of the case, and before there is a final trial readiness conference.

CPLR §3101 (a) allows for "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof..." In conformity with this rule, the rule in our department is that "full pre-trial examinations of co-defendants should be allowed, inter sese, with respect to all evidence which is material and necessary, even in the absence of a cross-claim by the moving co-defendant against the co-defendant sought to be examined (Schneider v. Doyle, 6 A.D.2d 122, 175 N.Y.S.2d 595 [1st. Dept. 1958]; Henshel v. Held, 17 A.D.2d 806, 233 N.Y.S.2d 14 [1st. Dept. 1962];Lombardo v. Pecora, 23 A.D.2d 460, 262 N.Y.S.2d 201 [2nd. Dept. 1965]; Snyder v. Parke, Davis & Company, 56 A.D.2d 536, 391 N.Y.S.2d 579 [1st. Dept. 1977]).

CPLR§ 3124 allows the party seeking disclosure to move to compel compliance or a response, when a party fails to respond or comply with any discovery request.

CPLR §3103(a) allows "the court at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, to make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designated to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

The supreme court has broad discretion to supervise discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice (Younquist v. Youngquist, 44 A.D.3d 1034, 845 N.Y.S.2d 787 [2nd. Dept. 2007]). When a party makes an application for a deposition of a nonparty late a protective order is warranted (Med Part v. Kingsbridge Heights Care Center, 22 A.D.3d 260, 802 N.Y.S.2d 403 [1st. Dept. 2005]).

Although IPA is not seeking a full deposition of Weyerhaeuser, and only seeks limited case specific discovery of information that would allow it to meet its burden of proving Weyerhaeuser's share of fault, in a way that would allow it to use the transcript of the deposition containing Weyerhaeuser's answers at trial, after Weyerhaeuser settled it is seeking the deposition of a nonparty.

In this action Defendant IPA obtained permission for a deposition from the Special Master and sent Weyerhaeuser a Notice of Deposition to take the deposition of its corporate representative after the Trial Readiness Conference had taken place and after Weyerhaeuser was no longer a defendant in the case. Weyerhaeuser has purchased its peace by settling with plaintiff, and would be annoyed, inconvenienced and incur the additional expense of producing a corporate representative for deposition if this motion is granted.

IPA argues that Weyerhaeuser should be returned to its former state and the court should, on equitable grounds, set aside the stipulation. "Stipulations of settlement are generally favored and will not lightly be set aside. A court may exercise its discretion to set aside a stipulation where there is cause sufficient to invalidate a contract such as a showing of fraud, collusion, mistake, accident, or some other ground of the same nature, including a showing that a party has inadvertently, inadvisably or improvidently entered into an agreement which will take the case out of the due and ordinary course of proceeding in the action, and in so doing may work to his prejudice... Where both parties can be restored to substantially their former position the court, as a general rule, exercises such power if it appears that the stipulation was entered into inadvisably or that it would be inequitable to hold the parties to it"(In re Frutiger's Estate, 29 N.Y.2d 143, 272 N.E.2d 543, 324 N.Y.S.2d 36 [1971]). IPA is not a party to the stipulation between plaintiff and Weyerhaeuser. Weyerhaeuser entered into a valid settlement with plaintiff which defendant IPA lacks standing to set aside (see Elite 29 Realty LLC v. Pitt, 39 A.D.3d 264, 833 N.Y.S.2d 456 [1st. Dept. 2007];Galasso, Langione & Botter, LLP, v. Liotti, 127 A.D.3d 688, 4 N.Y.S.3d 550 [2nd. Dept. 2015]).

Accordingly, it is ordered that the motion by IPA Systems, Inc., for an order compelling Weyerhaeuser, to comply with IPA's Notice of Deposition dated July 31 and August 19, 2019 and produce a Corporate Representative for deposition is denied.

ENTER:

Dated: November 12, 2019

Manuel J. Mendez
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE